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No. 86-88

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CITICORP INDUSTRIAL CREDIT, INC.,
Petitioner,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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This case is about the competing claims of creditors to the assets of an insolvent debtor—not a dispute between an employer and its employees as to wages due. Accordingly, the question presented is whether in enacting the Fair Labor Standards Act of 1938, Congress intended to alter the priority of creditors' claims against the assets of an insolvent.

Neither the Secretary nor *amicus* AFL-CIO cites any evidence that Congress intended to address the consequences of insolvency or to preempt state law traditionally governing the priority of creditors' claims. No decision of this Court requires that the purpose of the FLSA or common sense be ignored in determining the reach of Section 15(a)(1). The "familiar rule, that a thing may be within the letter of a statute and yet not within the statute, because not within its spirit, nor within the intention of its makers," *Church of the Holy Trinity* v. *United States*,

143 U.S. 457, 459 (1892), precludes any such approach to statutory interpretation. See, *e.g.*, *California Federal Savings and Loan Association* v. *Guerra*, 107 S. Ct. 683, 691 (1987). When read in light of the history and purpose of the FLSA, it is evident that Congress never intended Section 15(a)(1) to be used to coerce an *innocent secured creditor* to pay the wages of its insolvent debtor's employees as a condition of enforcing its security interest.[1]

1. The Secretary and *amicus* AFL-CIO assert that because the FLSA does not create an express "lien," it does not conflict with the priority of creditors' claims established by state and other federal law.[2] The Secretary denies that this action was brought to force payment of employee wages, and asserts that Citicorp's rights in the inventory collateral as against other Ely creditors have not been altered.[3] Labelling the judicially created prior charge against inventory to secure payment of wage claims something other than a "lien" does not change economic reality. Nor does the label mitigate in the slightest the conflict between the court of appeals' holding and the requirements of state and other federal law (such as the Bankruptcy Code) governing the priority of creditors' claims against insolvent debtors.

The economic reality is that $1.5 million of the proceeds of the sale of Citicorp's collateral is in escrow for the payment of a group of unsecured Ely creditors, namely, Ely's employees. Citicorp's perfected security interest in the inventory collateral is undisputed. Under

[1] The district courts found that *both* Citicorp and the employees were "*innocent parties.*" Pet. App. 25a-26a; 32a (emphasis added); *see also* Pet. App. 10a. Accordingly, the Secretary's thinly veiled suggestions that Citicorp was in any way complicit in Ely's failure to pay its employees are baseless and unwarranted. *E.g.*, Resp. Br. 9, 35, 41. The same is true of *amicus* AFL-CIO's blatant arguments to that effect. AFL-CIO Br. 26-27.

[2] Resp. Br. 14, 44-45 n.29; AFL-CIO Br. 3-4, 20-23.

[3] Resp. Br. 14.

Article 9 of the Uniform Commercial Code, therefore, Citicorp would have been entitled to satisfaction of its entire claim out of the proceeds of sale before there was anything to be distributed to other creditors. In contrast, the court of appeals' construction of Section 15(a)(1) requires that unsecured employee wage claims be paid first, ahead of secured claims.

In the district court, the Secretary's counsel admitted that the purpose of this action was to "pressure" Citicorp (and the insolvent employer) to pay employee wages, and further that the effect of entering an injunction against Citicorp was to create a "priority" for employee wage claims. See Pet. Br. 7 & n.7. The district court succinctly summarized the Secretary's position: "a creditor has no lien ahead of the payroll." C.A. App. 67. That proposition is squarely at odds with the entire jurisprudence of insolvent estates and secured transactions. Whatever label is used to characterize the Sixth Circuit's conclusion, the effect is to impose a prior charge on the inventory to secure payment of employee wage claims.[4]

Contrary to the Secretary's assertion, Ely's insolvency and the employees' status as creditors are not "incidental" (Resp. Br. 37), but central. The transparent purpose and obvious effect of this lawsuit was to force a secured creditor of an insolvent debtor to pay the junior claims of some unsecured creditors, contrary to the order of priority generally prescribed under state law. The Secretary's reliance (Resp. Br. 38-40) on the Flammable Fabrics Act and other federal statutes that have different purposes and effects is misplaced: those statutes do not require one creditor to pay the claims

[4] Citicorp had no independent obligation to pay the wages of Ely's employees. The sole basis for requiring Citicorp to pay the wage claims is its possession of the inventory. Accordingly, the wage claims represent an effective surcharge against the inventory. *See* Pet. Br. 4 n.4 (definition of "lien"). The suggestion that Citicorp was free to refuse to pay the wages and permit the goods to sit in a warehouse and become worthless is correct, but unhelpful. *See* Resp. Br. 37.

of another, and they are intended to further other federal policies such as health and safety.

In determining whether Congress intended the FLSA to displace state law governing the consequences of insolvency, the federal bankruptcy law in effect when the FLSA was enacted and today is much closer to the mark. Congress specifically addressed the consequences of insolvency. Like Article 9 of the Uniform Commercial Code, federal bankruptcy law expressly recognizes the validity of prior perfected liens as against unsecured wage claims. Pet. Br. 23 n.26. Indeed, within days of the effective date of the FLSA, Congress amended the bankruptcy law affirming the protection accorded prior lienholders over employee wage claims. The Chandler Act of 1938, 52 Stat. 840. As an indication of whether it is at all likely that the Seventy-Fifth Congress had any intent to elevate the priority of unsecured wage claims over prior valid lienholders in enacting the FLSA, the 1938 bankruptcy legislation is a far better guide than the Flammable Fabrics Act. More recently, Congress enacted two statutes that were intended to modify the claims of creditors against insolvents.[5] The statutes are narrowly drawn to protect two groups of unpaid sellers against all competing claims; in both, the mechanism for protection is a statutory trust, not a procedural form of coercion such as an injunction. The court of appeals' holding stretches the FLSA to govern an area it was never intended to reach, and in so doing puts the FLSA in irreconcilable conflict with at least three federal statutes. Pet. Br. 44-45.[6]

The whole case, then, comes down to this. Under Article 9 of the U.C.C., Citicorp's security interest in Ely's

[5] Packers & Stockyards Act, 7 U.S.C. § 196(b); Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499e(c). *See* Pet. Br. 44-45.

[6] Under the Sixth Circuit's reading of Section 15(a)(1), a trustee in bankruptcy may be precluded from liquidating the bankrupt's inventory in accordance with the priorities contemplated in the Bankruptcy Code, and the creditors Congress intended to protect in enacting the Packers & Stockyards Act and PACA are subject to

inventory takes priority over unpaid wage claims. If the Secretary wins this case, those priorities will be reversed; state law will be preempted. Further, the order of priority established in the bankruptcy law will be disrupted, and the purpose of the statutory trusts created in the Packers & Stockyards Act and in the Perishable Agricultural Commodities Act will be frustrated. Well established rules governing preemption and repeal by implication prevent such an ouster of state and federal law, except on a clear showing that Congress in fact intended such a result.[7] That is too heavy a burden to be borne on the shoulders of "any person." For reasons set forth in our opening brief (Pet. Br. 14-38), and explained further in this reply, those words addressed quite a different problem.

Even more important, it is agreed on all sides that Congress never considered the question in this case—whether the FLSA should effectively preempt and repeal otherwise applicable laws dealing with insolvency.[8] Yet, a specific, focused, congressional intent is precisely what is required before this Court will hold that state law has been preempted, or federal law implicitly repealed. Congress "will not be deemed to have significantly changed the federal-state balance . . . unless otherwise the purpose of the Act would be defeated." *Bowen* v. *American Hospital Association*, 106 S. Ct. 2101, 2121 (1986) (plurality opinion). This principle, developed in our opening brief, has been ignored rather than answered. It cannot be answered, and it governs this case.

Doubtless Congress has ample constitutional authority to prohibit interstate transportation of goods deemed

injunction prohibiting recovery of their inventory and related products, whenever a failed business results in unpaid wages, as is almost invariably the case.

[7] *E.g.*, *Bowen* v. *American Hospital Association*, 106 S. Ct. 2101, 2121 & nn.32-33 (plurality opinion) (1986); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976).

[8] The court of appeals acknowledged that "Congress never directly considered the question whether the 'hot goods' provision [29 U.S.C. § 215(a)(1)] applies to secured creditors." Pet. App. 12a.

harmful or dangerous. *United States* v. *Darby*, 312 U.S. 100 (1941). If Congress concludes that, to further its purposes, any such prohibition should extend to goods in the hands of a secured creditor, state law would be no obstacle. U.S. Const., Art. VI, para. 2. Whether Congress intended the prohibition of Section 15(a)(1) to extend to a secured creditor whose insolvent debtor fails to pay employee wages, however, is a question of statutory interpretation. The government's case falls far short of showing that Congress intended not just to pass a wage and hour law, but also to change existing law governing the priority of creditors' claims.

2. The Secretary asserts that three principal purposes of the FLSA are served by invoking Section 15(a)(1) against an innocent secured creditor of an insolvent employer: (a) to protect against unfair competition, (b) to encourage creditors to police compliance by their debtors, and (c) to exclude from commerce goods produced under substandard conditions.[9]

a. As to the first, if trade regulation was a purpose of the FLSA, that purpose would not be furthered by applying the Act here. Citicorp is not in the clothing business; its *only* interest in the Ely inventory is as security for \$9.5 million advanced under the loan agreement. To minimize its loss on the loans, Citicorp must sell the goods at the best price it can obtain in the market. Whether Ely's cost of producing the goods included payroll expense or any other expense does not affect the market price. The creditor must sell in a commercially reasonable manner under the Uniform Commercial Code, §§ 9-504, 9-507. There is no incentive to sell the goods at a discount solely because its debtor failed to pay for some

[9] *See* Resp. Br. 31-37; *see also* AFL-CIO Br. 8 n.3. The sole purpose of the FLSA was to establish decent wages. Pet. Br. 19-22. The effects on commerce identified in Section 2(a) of the Act are the bases for Congress' exercise of its power under the Commerce Clause, not purposes independent of establishing wage and hour standards. Characterizing the elimination of those effects as purposes of the FLSA, however, does not lead to a different result.

labor or materials used in producing the collateral. A secured creditor's sale of collateral thus poses no threat to competition.

b. The Secretary argues that invoking Section 15(a)(1) against a secured creditor will encourage the creditor to police compliance with the Fair Labor Standards Act.[10] Presumably, to justify such an obligation, both the Secretary and *amicus* AFL-CIO emphasize that Citicorp monitored aspects of Ely's business *other than its payroll practices* and that Citicorp advised Ely that no additional funds would be advanced under the financing agreement.[11]

Monitoring by a secured creditor (or, for that matter, by any third party who does not control an employer's payroll practices) *cannot prevent* a violation of the substantive requirements of the FLSA. Moreover, if, as in this case, the failure to pay employee wages was never part of the debtor's business practice, but due to insolvency, monitoring accomplishes nothing. After the missed payroll, a secured creditor has no ability to force the employer to pay, especially when no further loans are being made. See Resp. Br. 18 n.9 (noting futility of action against an insolvent employer).

The financing agreement specifically required Ely to comply with applicable federal and state law requirements. Pet. App. 12a n.11. After Ely's asserted violation, under the Secretary's view, Citicorp's choices were to pay the employees or to forgo its security for the \$9.5 million loans. Even if Citicorp had discovered the missed payroll at the same time as the employees, under the Secretary's view, its choices would have been the same.

[10] Resp. Br. Br. 34-35. As discussed in petitioner's opening brief and further below, the argument incorrectly assumes that Congress intended to impose such an obligation. Pet. Br. 26-38; pages 12-17, *infra*.

[11] Resp. Br. 6, 34, 41-42; AFL-CIO Br. 19, 26.

Accordingly, requiring a secured creditor to police compliance by its debtor in these circumstances would not prevent non-payment by the employer, but would only burden the creditor.[12]

Citicorp's knowledge that no additional funds were to be advanced under the financing agreement provides no basis for invoking Section 15(a)(1) to require payment of the employee wages. Apparently, the Secretary believes that Citicorp should be sanctioned for having failed to notify *the employees in addition to notifying the Ely management* that no further funds would be advanced under the agreement, and failing to advise the employees that Ely management might use previous loan proceeds for purposes other than payment of wages. First, Citicorp had no obligation to undertake any such unwarranted interference in Ely's business. More important, Citicorp also knew that Ely might be successful in obtaining alternative financing to pay the wages.

The Secretary asserts that invoking Section 15(a)(1) against an innocent secured creditor eliminates an incentive to encourage continued operations under circumstances where employees are not "likely" to be paid.[13] The Secretary fails to explain when in his judgment it became "likely" that employees would not be paid in this case; nor does the Secretary offer any basis for the implicit assumption that Congress intended to force a business to close when financial difficulties make it "likely" that employees may not be paid. In any event, there is no evidence whatever that Citicorp encouraged Ely to continue operations. As the Secretary acknowledges, Citicorp postponed taking possession of the inventory to permit Ely's management an opportunity to secure alternative financing.[14] If Ely's management had been successful, the employees would have been paid.

Thus, enforcing Section 15(a)(1) against an innocent third party does nothing to encourage compliance by an employer whose failure to pay the minimum wage is due solely to *insolvency*. Any effect on a third party is irrelevant to either the employer's ability to pay or the employer's clear obligation to pay. In addition, it is difficult to conceive of circumstances (and the Secretary suggests none) when punishing the creditor will affect the conduct of the employer *absent* some joint effort to circumvent the Act.

c. At several points, the Secretary suggests (*e.g.*, Resp. Br. 33, 34) that Congress had an *independent* purpose to exclude from commerce goods produced under substandard conditions. That suggestion defies common sense and history. Pet. Br. 19-26. "In the [FLSA], the *primary purpose of Congress was not to regulate interstate commerce as such.* It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation. It sought to raise living standards without substantially curtailing employment or earning power." *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 509-510 (1950); see *id.* 529 (Frankfurter, J., dissenting).[15]

3a. The Secretary correctly observes that a threshold issue in this case is whether an insolvent employer's failure to meet its payroll in the week or two preceding termination of business violates the substantive require-

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[12] Further, interference with management decisions by a secured creditor, however laudatory, may result in subordination of the secured creditor's claim or joint liability with the debtor to other creditors. *See* NCFA *Amicus* Br. 15.

[13] Resp. Br. 35.

[14] Resp. Br. 7. There is nothing in the record that indicates that Citicorp knew Ely's management would be unable to obtain alternative financing.

[15] Neither *Darby* nor this Court's more recent decision in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), is to the contrary.

ments of the FLSA.[16] The statute establishes minimum wage rates, and it is directed at "chiselers," not insolvents; the problem Congress addressed was excessively low wages, not the consequences of insolvency. Pet. Br. 19-26. The remedial provisions of the Act (including the provisions for liquidated damages, attorneys fees, and enforcement by the Secretary) are plainly directed at the chiseler, rather than an employer whose failure to pay agreed wages, admittedly in excess of the prescribed minimum, is due solely to insolvency.[17] In short, as the Secretary recognizes (Resp. Br. 18 n.9) the FLSA creates rights and remedies for the benefit of employees that

[16] The court of appeals decided the issue, and it is fairly encompassed by the question presented. Rule 21(1)(a), Rules of the Supreme Court of the United States.

[17] None of the cases cited by the Secretary even addresses the question of whether the Act is properly invoked in such circumstances. In *Torres* v. *American R. Co. of Porto Rico*, 157 F.2d 255 (1st Cir.), *cert. denied sub nom. American R. Co. of Puerto Rico* v. *Romero*, 329 U.S. 782 (1946), the court held that after a violation of the FLSA a release executed upon payment of half the additional wages due does not bar recovery of the balance by an employee under Section 16(b), even if the employer is in financial difficulty. Similarly, the other cases discuss the scope of the district court's power to deny equitable relief because of the potential financial hardship on an employer found to have violated the Act. *See generally Amoco Production Co.* v. *Village of Gambell*, 55 U.S.L.W. 4355, 4358-4359 (1987); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982). In *Wirtz* v. *Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968), the court held that a district court improperly denied an injunction against continued withholding of backpay on the grounds of the employer's good faith violation of the FLSA and the potential financial hardship. In *Hodgson* v. *Taylor*, 439 F.2d 288 (8th Cir. 1971), the court held that financial hardship was insufficient grounds for refusing an injunction under the circumstances. Finally, in *Hodgson* v. *A-1 Ambulance Service, Inc.*, 455 F.2d 372 (8th Cir. 1972), the court concluded that while a district court might properly take into account the financial condition of an employer in determining the terms and conditions for payment of backpay as a condition of purging a civil contempt, the employer's financial difficulties did not warrant refusal to enter an order requiring payment.

are meaningless, as a practical matter, except in the context of an ongoing business. It was passed with "the sole purpose and aim of raising existing wages in the lower wage groups." 82 Cong. Rec. 1395 (Dec. 13, 1937) (Statement of Rep. Randolph).[18]

Even if there were a technical violation of the substantive requirements of the FLSA because no wages were paid during the last pay period as Ely slipped into insolvency, and Ely might have been "enjoined" under Section 15(a)(1) from shipping its inventory until it paid the wages (although that alone might deny the insolvent its last chance to pay the employees), it is clear that such circumstances are far removed from the core concerns that prompted the FLSA. Unless Congress also intended that Section 15(a)(1) be invoked to hold an innocent, good faith secured creditor responsible for such a "violation," the judgment of the Sixth Circuit must be reversed.[19]

[18] This Court's "usual approach to the FLSA" (Resp. Br. 21) does not aid the Secretary here. For this Court's "usual" approach is to construe the FLSA coverage and exception provisions in the context they were intended to govern: wage and hour standards. *See, e.g., Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178 (1946) (rejecting the maxim *de minimis* as basis for excluding a newspaper publisher from coverage); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 616-617 (1944) (rejecting Administrator's attempt to limit scope of explicit exception). This Court's "usual" approach to construing the FLSA has never been employed to extend the Act to govern the consequences of insolvency.

[19] Contrary to the Secretary's repeated suggestion that there is no reason Citicorp should be in a better position than Ely (*e.g.*, Resp. Br. 20), it is not at all uncommon for a bona fide, good faith purchaser, without notice to take goods free of claims that would be good against its seller. *See, e.g.*, U.C.C. §§ 2-403, 9-307. Moreover, the reasons Citicorp should be in a better position than Ely are numerous. The most obvious are: (1) if there was a violation of the law, the violation was Ely's, not Citicorp's; (2) Citicorp exercised no control over Ely's payroll practices and thus shares no responsibility for any violation; (3) Citicorp loaned Ely $9.5 million dollars *before any* violation occurred, with no practicable means of recovery except through the security for which it had contracted

b. Unable to show that any purpose of the FLSA is served by enforcing Section 15(a)(1) against an innocent secured creditor, the Secretary asserts that "[t]he text is dispositive." Resp. Br. 12. More specifically, the Secretary argues that the phrase "any person," the common carrier proviso, and the 1949 amendment to Section 15(a)(1) reveal Congress' deliberate intention that the provision be used to force a secured creditor to pay the wages of its insolvent debtor's employees.

This Court's decisions affirm that "the text is only the starting point."[20] "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[21] The "plain language" of a statute always must be evaluated against the background of its history and purpose, for "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[22]

The Secretary does not deny that the legislative history of the Act indicates that the phrase "any person" in Section 15(a)(1) was understood by its draftsmen and explained during the hearings as necessary to avoid circumvention of the substantive provisions of the Act by practices such as subcontracting to sweatshops.[23] Instead,

in good faith; and, as already explained, (4) no purpose of the FLSA is served by punishing Citicorp for Ely's wrong.

[20] *Kelly* v. *Robinson*, 107 S. Ct. 353, 358 (1986); quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

[21] *Offshore Logistics, Inc.* v. *Tallentire*, 106 S. Ct. 2485, 2494 (1986) (internal quotation marks and citations omitted).

[22] *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892); *see California Federal Savings & Loan Association* v. *Guerra*, 107 S. Ct. 683, 691 (1987); *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 201 (1979); *see also Jersey Shore State Bank* v. *United States*, 107 S. Ct. 782, 785 (1987) (rejecting literal interpretation of tax notice provision, because inconsistent with Congress' purposes).

[23] Resp. Br. 24-25 n.15. *But cf.* AFL-CIO Br. 11 & n.8.

the Secretary asserts that circumvention *by subcontracting* was not the *only* purpose of the language of Section 15(a)(1). Citicorp never suggested that subcontracting is the only means of circumventing the Act Congress intended to reach. Pet. Br. 26-28. Subcontracting to "sweatshops" is simply the most obvious means of circumvention Congress hoped to address by broadly proscribing the shipment of hot goods in interstate commerce by "any person." The point is that where, as here, nonpayment is due to insolvency, the holder of the goods is wholly innocent of any wrongdoing, and there is *no evidence* of collusion or any attempt to circumvent the substantive requirements of the Act, the case is outside the intended reach of Section 15(a)(1). *See Shultz* v. *Factors, Inc.*, 65 Lab. Cas. (CCH) ¶ 32,487 (4th Cir. 1971).[24]

[24] The Secretary cites an exchange between George H. Davis, President, Chamber of Commerce of the United States, and Representative Thomas as evidence that Congress understood and intended that Section 15(a)(1) would be invoked against "innocent purchasers without notice." Resp. Br. 25 n.15. The comments suggest precisely the opposite conclusion. In response to Mr. Davis' concern that, as drafted, the predecessor to Section 15(a)(1) might be invoked against "innocent purchasers without notice," Representative Thomas assured him that the concerns were unfounded:

> "In reference to your observations referring to the penalties that may be placed upon the innocent holder of substandard goods, that strikes me most forcibly. However, let me point out to you that perhaps some of your fears are unfounded . . . . I recall distinctly that the bill specifically provides that the Board shall have authority to excuse and make exceptions where good faith is shown by those who purchase these goods made under substandard conditions.
>
> . . . .
>
> . . . "[I]f you will keep reading the bill, you will find it specifically mentioned in there that *the innocent holder of substandard made goods will be excused.*"

Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor, 75th Cong., 1st Sess. 941 (1937) (statement of Rep. Thomas); *see id.* 937 (statement of George H. Davis, President, Chamber of Commerce of the United States).

The Secretary further asserts that the "common carrier" proviso of Section 15(a)(1) "would hardly have been necessary if . . . the prohibition was meant to apply only to those responsible for the violation."[25] The common carrier proviso was included to avoid the prospect of having the constitutionality of the Act tested in litigation to which the government was not a party.[26] Any case in which the scope of Section 15(a)(1) was relevant necessarily would have involved the government, since no one else could file suit to enforce the provision. Accordingly, the common carrier proviso can provide no basis for inference as to the intended scope of Section 15. The proviso certainly does not reflect any congressional intention that Section 15(a)(1) be invoked to punish any other innocent, third party in possession of "hot goods." It was not an "exemption" to Section 15(a)(1), and sheds no light on its meaning.

The Secretary further observes that "Congress devoted considerable attention to the specific question whether 'innocent' purchasers of hot goods should be exempted from Section 15(a)(1)." Resp. Br. 25. All the more telling in light of that fact, is the failure of either the Secretary or *amicus* AFL-CIO to cite even one "snippet" of legislative history suggesting that *anyone thought it appropriate* that innocent purchasers *should be subject* to injunction under Section 15(a)(1) or, conversely, that exemption of such purchasers was inappropriate. The Secretary suggests that the omission of the proposed

[25] Resp. Br. 19. As noted, Citicorp's position never has been that Section 15(a)(1) is applicable only to employers. It was intended to apply to employers as well as to those acting in collusion with the employer to circumvent the substantive provisions of the Act. Pet. Br. 26-28.

[26] The common carrier proviso was intended "to prevent a case involving the constitutionality of the Act from arising in a suit between a shipper and a common carrier, to which the Government was not a party, inasmuch as the common carrier has no interest in the issue of constitutionality, but only in its obligation to accept goods for transportation." H.R. Rep. No. 2182, 75th Cong., 3d Sess. 14 (1938).

"exemption" provision in 1938, without more, supports the view that Congress considered and concluded that it was appropriate to punish innocent third parties.[27] The exemption authority provision as well as the certificate of compliance provision reflect Congress' obvious intention *not to punish innocent, good faith purchasers of hot goods.* Pet. Br. 28-32; note 24, *supra.* Those provisions *were not the subject of any criticism,* and, therefore, their omission cannot reasonably support any inference of a deliberate decision by Congress to punish innocent third party purchasers.

Finally, the Secretary argues that the 1949 amendment reflects a deliberate intention to punish innocent purchasers, because "[i]f Congress had wanted to create a broader exemption for *all* good faith purchasers, or for secured creditors, it surely knows how to do so." Resp. Br. 31. Congress properly addressed the problem presented; until 1966 neither the Secretary nor anyone else had suggested that Section 15(a)(1) could be invoked against an innocent secured creditor. Pet. Br. 36-37 & n.56. There was no need to provide a broader exemption than was necessary to address the problem presented.

As discussed in petitioner's opening brief, the specific purpose of the 1949 Amendment was to correct an error by the Secretary's predecessor, who had attempted to apply the Act to one group of innocent purchasers to whom it was not intended to apply. There is nothing in the legislative history and nothing in common sense which would support the proposition that in correcting the error the Administrator made in applying the statute to one group of innocent purchasers, Congress thereby endorsed the Secretary's view as to other innocent parties. Congress in 1949 did not, as the Secretary suggests, add a sepcific execption for certain innocent purchasers.

[27] As the Secretary acknowledges, the provision would not have applied in the circumstances of this case (Resp. Br. 27-28 n.17), in any event. Pet. Br. 30 n.41.

Rather, it overrode the Administrator's erroneous view that the Act was ever intended to apply to such purchasers, absent extraordinary efforts to police compliance with the FLSA by their sellers.[28] The Secretary's contrary position is nothing more than a refusal to face up to the legislative history of the 1949 amendment. Pet. Br. 32-37, & App. 1a-5a.[29]

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[28] The Administrator's pre-1949 enforcement policy is correctly described in petitioner's opening brief. Pet. Br. 33-34 and nn.48-49. The Secretary apparently contends (Resp. Br. 29-30 n.18) that the Administrator's statement was an expression of *enforcement policy only* with respect to the theoretical possibility of a criminal action for "willful" violation of Section 15(a)(1). In the far more likely context of civil injunctive proceedings, the Secretary suggests the statement was merely a meaningless collection of helpful hints as to how to avoid purchasing hot goods. According to the Secretary, the Administrator's statement of enforcement policy meant that an innocent purchaser of hot goods would not be criminally prosecuted if he had undertaken the "suggested" policing efforts, but he would remain subject to injunction, notwithstanding those efforts.

The express purpose of the statement was to set out the "steps which will show *an honest effort to avoid* the purchase of goods or materials manufactured in violation of the minimum wage and overtime provisions of the statute *and which will satisfy the enforcement policies* of the Administrator." BNA, *Wage and Hour Manual* 937 (Cum. ed. 1945) (emphasis added). In discussing civil injunctive proceedings, the Administrator explained "that the manufacturer desiring to comply fully with the provisions of the Act *should have some means of protection available to him so that he will not find himself with 'hot goods' on hand which he cannot ship across state lines and which because of that, may become worthless to him.*" *Id. See id.* 938, 939. Suggestions as to how to avoid *the purchase* of hot goods provide no protection in the only circumstance it makes a difference, namely, when the purchaser finds himself in possession of hot goods, notwithstanding the most diligent policing efforts.

[29] Having dismissed as meaningless the practical construction of the intended reach of Section 15(a)(1) expressed in his predecessor's statement of enforcement policy, however, the Secretary "charitably" describes the pointed criticism by Representatives Barden and Jacobs respecting the policy as "opaque". Resp. Br. 31 n.19. The statements are not opaque. They clearly and unequivocally express the view that the Administrator's reading of Section 15(a)(1) swept far too broadly. Pet. Br. 35; Pet. Br. App. 1a-2a. If the language the congressmen used is opaque, "English speech" (Resp. Br. 31) is indeed a poor vehicle for clear expression of ideas.

The 1949 amendment rejects the Administrator's position by providing ordinary commercial purchasers with protection from prosecution under Section 15(a)(1), without extraordinary efforts to police compliance by their sellers. Notwithstanding the Secretary's attempt to obscure the obvious import of Congress' action, the provision does far more than provide a "less burdensome" means of protecting *against inadvertent violation* of the Act. It "protects . . . [against] having goods . . . purchased in good faith ordered to be withheld from shipment in commerce by a 'hot goods' injunction." H.R. Conf. Rep. No. 1453, 81st Cong., 1st Sess. 31 (1949). As the Conference Report indicates, "[t]he requirement that he must have made the purchase in good faith is comparable to similar requirements imposed on purchasers in other fields of law, and is to be subjected to the test of what a reasonable, prudent man, acting with due diligence, would have done in the circumstances." H.R. Conference Report 1453, 81st Cong., 1st Sess. 31 (1949). So long as the good faith purchaser obtains a written representation from the seller that the goods were produced in compliance with the Act, no prosecution is permissible. The "affirmative duty" to obtain such a statement was consistent with existing commercial practice. Pet. Br. 36 n.53.[30]

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[30] Both the statement of Mr. Forsythe and the language of the 1949 Conference Report, on which the Secretary relies (Resp. Br. 29), reflect the broad language of Section 15(a)(1), and, of course, the Administrator's position that, absent extraordinary efforts to police compliance, honesty and good faith, in fact, were not enough to avoid Section 15(a)(1). Neither statement suggests that Congress ever intended that an innocent good faith purchaser be subject to injunction under Section 15(a)(1). Moreover, neither of those statements contradicts the Administrator's practical recognition that innocent good faith purchasers (though improperly "defined" in the statement of enforcement policy) were never intended to be punished under Section 15(a)(1).

Amicus AFL-CIO suggests that if the question had been raised in 1949, Congress would have refused to provide an exemption for secured creditors because of the extent to which secured creditors monitor certain aspects of their debtors' businesses. AFL-CIO Br. 19. The Administrator's rationale for imposing such requirements on certain ordinary commercial purchasers was identical. Pet. Br. 33 n.49. Congress rejected that rationale for ordinary commercial purchasers. There is no reason to assume it would have reached any different conclusion as to secured creditors. Unlike ordinary commercial purchasers, a secured creditor commits funds before any non-payment problem arises—possibly years earlier in the case of a term loan—and has no means of rescinding its purchase, or of avoiding possession of hot goods once a violation has occurred. In contrast, an ordinary commercial purchaser generally can turn to alternative sources of supply whenever it learns of a failure to pay wages. The suggestion that Congress would have protected individuals who exercised a choice, but denied protection to secured creditors who have no choice once funds have been advanced is implausible in the extreme.

4. The Secretary and *amicus* AFL-CIO assert that in construing the Fair Labor Standards Act, the past 50 years of history should be dismissed out of hand as of no consequence. Resp. Br. 45-46; AFL-CIO Br. 28-29. The significance of *Powell Knitting* and the uniform course of decisions over the past 20 years is that good judicial administration commands respect for settled rules of law.[31] Settled commercial practices and the expectations of parties who reasonably rely on settled law cannot be ignored. As Judge Engel suggested in his dissent, such a departure from settled law requires compelling reason. Pet. App. 15a-16a. Here there is none.

According to the AFL-CIO, no rule of law can be "settled" until decided by this Court. AFL-CIO Br. 29.

[31] The only cases noted as accepting the Secretary's theory came after the district court decisions in this case. Resp. Br. 23 n.13.

That position ignores common sense and the practical realities of judicial administration in this country. This Court cannot address every question of law raised by every litigant in every federal court in the country in a timely fashion.[32] Businesses and individuals must plan their finances, activities, and contracts based on the law as it exists. When a long-settled rule has not been the source of any practical difficulties; when there has been *no* contrary published decision in any court; and when there is as little as there is here to commend a contrary position, the legitimate expectations of businesses and individuals are entitled to consideration.

Somewhat inconsistent with the position that long-standing judicial authority is entitled to no consideration at all, the Secretary suggests that this Court defer to his interpretation of the statute. Resp. Br. 22. First, this case involves not just the FLSA, which the Secretary administers, but a substantial body of law governing the priority of creditors' claims, including both state law (Article 9, Uniform Commercial Code) and federal law (the Bankruptcy Code), as to which the Secretary has no claim to knowledge, expertise, responsibility, or deference. Moreover, the question in this case is purely a matter of statutory interpretation, on which the judiciary is the final authority.[33] An agency construction of a statute that is "inconsistent with the statutory mandate or . . . frustrate[s] the policy that Congress sought to implement," *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981), is entitled to no deference and should be rejected. Here, the structure, pur-

[32] *See Watt* v. *Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) ("The federal judicial system is undergoing profound changes. Among the most significant is the increase in the importance of our courts of appeals. Today they are in truth the courts of last resort for almost all federal litigation").

[33] *INS* v. *Cardoza-Fonseca*, 55 U.S.L.W. 4313, 4320 (1987); *Chevron USA Inc.*, v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Bureau of Alcohol Tobacco and Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983).

pose, and history of the Fair Labor Standards Act of 1938 make it plain that Section 15(a)(1) was never intended to address the priority of creditors' claims against insolvent debtors or to be invoked against innocent secured creditors of insolvent debtors. Accordingly, the Secretary's position to the contrary must be rejected.

CONCLUSION

For the foregoing reasons, and the reasons set out in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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